In the United States Circuit Court of Appeals for the Ninth Circuit

DAN D. SUTHERLAND,
Plaintiff in Error,

vs.

FRANK W. PURDY,
Defendant in Error.

No. 2583

WRIT OF ERROR TO THE DISTRICT COURT OF THE TERRITORY OF ALASKA, THIRD DIVISION.

HON. FRED M. BROWN, *Judge.*

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MOTION FOR REHEARING.

The defendant in error respectfully moves for a rehearing upon the following grounds:

1st. That the court has misconstrued the law applicable to this case, and particularly the Act of Congress approved August 1st, 1912, in that there is nothing in said Act, or in the laws of the United

States, or of the Territory of Alaska, which renders null and void a placer mining location made upon the public domain in Alaska by power of attorney prior to July 30th, 1913, because of the failure to record such power of attorney prior to the performance of other acts of location.

2nd. That the judgment of the trial court herein should not be reversed for the reason that this is an action in ejectment, and the plaintiff must rely on the strength of his own title and not on the infirmaties of defendant's title, and the plaintiff in this case failed to comply with the laws of the Territory of Alaska in locating the alleged mining claim upon which his cause of action is based.

3rd. Even if this court should reverse the judgment of the trial court, it should order a new trial.

ARGUMENT.

The majority opinion holds, in substance, that under the so-called Wickersham Act of August 1st, 1912, the power of attorney must be recorded prior to the other acts of location, its record prior to intervening rights being held insufficient, presumably

on the ground that acts of location attempted prior to its record are null and void.

The rule is recognized, as stated in *Creede etc. vs. Uinta etc.* (196 U. S. 337, 49 Law Ed. 501), that a location attempted prior to discovery is made valid by a subsequent discovery before intervening rights. This in spite of the fact that Section 2320 U. S. Rev. Stat. provides that

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

The Act of August 1st, 1912, contains substantially the same provision as to the power of attorney, the language being:

"That no person shall hereafter locate any placer mining claim in Alaska as attorney for another, unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded," etc. (Sec. 129-b, Compiled Laws of Alaska, 1913.)

With this almost identical language, the only reason for applying a different rule to the Wickersham Act must be found in Section 129-e, which reads:

"That any placer mining claim attempted to

be located in violation of this act shall be null and void," etc.

Can it be said that a person who marks the exterior boundaries of a mining claim so that the boundary line can be readily traced, before making any discovery of mineral within the boundaries of the claim, has violated Section 2320 U. S. Rev. Stat.? We submit that the rulings of the courts are unanimous in their support of the proposition that it is immaterial in locating a mining claim which act precedes, the discovery of mineral or the marking of the boundaries of the claim, if both acts are completed before the rights of others intervene. Yet Section 2320 U. S. R. S., *supra,* provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." If location prior to discovery is a violation of that section of the statute, then it must be admitted that the courts have recognized the validity of a mining claim, although located in violation of law. Can it be said that if Section 2320 U. S. R. S., *supra,* had contained the forfeiture clause of the Wickersham Act, that the courts would have held that because a locator had marked the boundaries of his claim prior to dis-

covery, he had violated the terms of the Act and his location was thereby rendered null and void?

The question necessarily arises whether the acts performed by Gates for Purdy were "in violation of this act." If not in violation, then they were not "null and void." We must remember that these acts were performed prior to the time when the territorial act of April 30th, 1913, went into effect, and under the rule stated in *Sturtevant vs. Vogel* (167 Fed. 452), record of location notice was unnecessary. The only acts necessary to a valid location by defendant were discovery and marking of the boundaries. Did Gates violate the Wickersham Act by making a discovery prior to the record of his power of attorney? Manifestly not. Was his staking of the ground prior to the record of the power of attorney "in violation of this act"? We contend not. It would be a violation of the Wickersham Act if he attempted to locate more than two placer mining claims for Purdy during any calendar month, for such is expressly prohibited by the Act. For the same reason it would be a violation of the Wickersham Act if Gates attempted to locate more than two placer mining claims for himself in

any calendar month, but surely he did not violate the act by making the discovery, or even by marking the boundaries, for the very good reason that *the act does not prohibit his doing either,* while it does prohibit him from making more than two placer mining locations in any calendar month.

The Legislature of Alaska recognized this distinction in the Act of April 20th, 1913 (Session Laws of Alaska of 1913, p. 289). Sections 12¼ to 12¾ limit the size of the association placer mining claims, and the number of claims which may be located by any person. Sections 14 to 17 inclusive of that Act require the locator to do certain things, such as posting notice, marking boundaries, and recording. Section 18 treats any attempted location in excess of the area allowed as a violation of the Act, but a failure to properly post or record notice as merely a non-compliance with the Act. Note the language of that section:

"If the discoverer of any placer deposit fails to comply with any of the provisions of Sections 14, 15, 16 and 17, within the time therefor specified, all right to appropriate any portion of the public domain by reason of his discovery shall cease, and any placer mining claim attempted to be located in violation of Sections 12¼, 12½ and 12¾, or any

of them, shall be null and void, and the area thereof may be located by any qualified locator as if no such previous attempt had ever been made."

The Legislature drew a clear distinction between a violation of the law and a non-compliance with it. The distinction is clear and explicit, and allows the locator nothing in either event.

The Wickersham Act contains no such provision. It simply declares that locations attempted in violation of the act shall be null and void. It is clear that an attempt to locate more than two placer mining claims in any calendar month would be in "violation of this Act," and we submit that it is equally clear that the making of a discovery or marking of the boundaries prior to the record of a power of attorney is not in "violation of this Act" for the very sufficient reason that the act did not prevent Gates from making a discovery or even from marking the boundaries of the claim he was locating for Purdy. We submit this reasoning is absolutely correct. Even if technical, still it is technically correct, and should be followed strictly in this case for the reason that forfeitures are abhorrent to the law. We need not refer to the various cases in which this court has held that such

forfeitures will be strictly construed. We submit that the acts performed by Gates prior to the record of his power of attorney from Purdy cannot be held to be "in violation of this Act," unless the court will undertake to read into the law something not contained in its express provisions. In other words, this court must at least supply the defects in the law and enlarge upon it in order to declare a forfeiture in this case, and this despite the well established rule that forfeitures must be strictly construed.

Secondly, we submit the plaintiff must recover on the strength of his own title and not on the weakness of his adversary. The testimony in the record is insufficient to show that a proper notice was posted on the ground and that manifestly the recorded notice is not in compliance with the territorial law. The notice recorded by the plaintiff in error is in the record (Tr. pp. 323-324), and we submit that it fails to comply with the territorial law in that it lacks a sufficient "description of the location of such claim with reference to some natural object, permanent monument or well known mining claim; and the description of the boundaries,

corner monuments and markings thereon." (Sec. 10, Session Laws of 1913, p. 288).

In this connection we refer to the recent decision of this court *In re Cloninger vs. Finlaison* (230 Fed., 98). It was there held that the description of the claim as "No. 1 Bear Creek Placer Mining Claim" situated in the White River Mining District, and that "Bear Creek is a tributary to Big Eldorado" is not sufficient. This is substantially the same description contained in the recorded notice of the plaintiff in error, except that he adds that the claim is situated between Nelson's No. 2 and Bell's No. 3. There is nothing to show, however, that these are "well known mining claims." They could not be, for the testimony in the record shows that the district was newly discovered, and that all of the locations there were made within a month or six weeks prior to plaintiff's location.

A still more serious defect occurs in that plaintiff's recorded notice wholly lacks any "description of the boundaries, corner monuments, and markings thereon." A brief description of the boundaries is given as running from initial point to stake No. 1, Stake No. 2 etc., but there is no description given

of those "corner monuments and markings thereon." The language of the territorial act specifically requires this description. Will this court ignore the same, especially in a location made by a "jumper," or a person who is seeking to take advantage of the technical defects of a prior location? The record clearly shows that the defendant was first in point of time, and was in absolute good faith. Gates was one of the men who revealed the Shushana diggings to the world, and was attempting to make a location for Purdy, who had furnished him funds with which to make the trip for that purpose. The defendant in error is entitled to all the advantage which goes with the "first stakes." There is absolutely no question about his good faith or priority in point of time. This is entitled to the same consideration from this court as was given it by the Alaska court. The plaintiff seeks to take advantage of technical defects of the location made for the defendant, and the court should be at least equally technical in passing upon the location made by the plaintiff in error. The language of the territorial act requires him to give a description of the "corner monuments and markings thereon." In this his recorded location notice is wholly lacking, and that defect was

held fatal by the Supreme Court of the United States *In re Butte City Water Company vs. Baker,* (196 U. S., 49 Law Ed., 409). That case was first passed upon by the Supreme Court of the State of Montana (28 Mont., 222, 72 Pac., 617, 104 Am. Stat. Rep. 683). The specific defect charged against the recorded notice was that it did not contain a description of the corner monuments and markings thereon, as is required by the Montana Statutes. The Supreme Court of Montana said:

"We have examined this notice of location, and are satisfied that it does not conform to the statute of the state of Montana, or with the construction thereof by this Court in the case of *Purdum vs. Laddin,* 23 Mont., 387, 59 Pac., 153. The question as to the right of the Legislature to provide rules for the marking of the boundaries of mining claims, and providing for a record of such location, and what the recorded paper must contain, has so long been recognized in this state, and has so many times been approved, by this court, that it would be useless to enter again into any consideration of the questions so decided."

We quote the following from the *syllabus* in the case of *Purdum vs. Laddin,* cited in the last case:

"Under Pol. Code, Sec. 3612, providing that the declaratory statement containing a description

of a mining claim filed with the county clerk must contain the location and description of each corner, with the markings thereon, a statement describing a claim by metes and bounds, and giving no description of the corners or the markings thereon, is invalid."

Now, that is precisely the defect which was charged against the notice of location recorded by the plaintiff in error. It is the same defect which the Supreme Court of Montana held fatal, and its ruling received the approval of the Supreme Court of the United States. Surely this court will not pass lightly over the same defect in this case, precisely the same failure to comply with the laws of Alaska. It cannot do so in the light of its decision *In re Cloninger vs. Finlaison, supra.* It cannot do so without disregarding the decision of the Supreme Court of the United States. Especially it should not do so in this case, wherein the plaintiff in error is himself seeking to take advantage of the technical defects of a prior locator, and to deprive him of the fruits of his discovery. This court is perhaps not compelled to give consideration to the fact that the recorder was absent from the district when the defendant's discovery was made and the claim staked for him. The stern rules of law may justify

or even demand that the defendant suffer this injustice; that he forfeit the fruits of his toil to one who comes later and profits by the defendant's discovery, but surely the plaintiff is not warranted in asking that the rule of strict construction relative to forfeitures be liberalized in this case in his favor. If that part of this motion be denied, then we contend for an equally strict construction as to the notice recorded by the plaintiff in error. He has wholly failed to comply with this particular requirement of the territorial law then in force, a failure which the Supreme Court of the United States held fatal, and which we respectfully submit must be held fatal by this court in the case at bar.

Thirdly, if this court reverses the ruling of the trial court and sets aside the judgment, it should refuse to direct the entry of a judgment by the trial court, but should order a new trial. The plaintiff in error prays judgment against the defendant for damages for withholding the possession of the ground in controversy. The defendant in error is entitled to have the verdict of a jury upon this claim, and upon all of the other issues raised. The jury must also pass upon the question as to whether

or not the plaintiff posted a sufficient notice, properly marked the boundaries of his claim, and recorded his notice, all as required by the territorial act of 1913, which went into effect subsequent to defendant's location, but some thirty days prior to plaintiff's alleged location. The defendant is entitled to have the verdict of the jury upon the sufficiency of the evidence as to the posting of notice upon the ground, and the performance of all the acts required in that connection. This is necessary, even though conceding a valid discovery and proper staking; the defendant is entitled to have the verdict of the jury upon that question as well as upon the question of damages.

We submit, therefore, that the defendant completed all of the acts constituting a valid location prior to the plaintiff's alleged location; that he did not violate the Wickersham Act by locating the claim through his agent who had failed to record his power of attorney prior to location, but who did record his power of attorney prior to plaintiff's alleged location; that the location of the mining claim by the agent of the defendant prior to the recording of the power of attorney was not a violation of the Wickersham Act, but merely a non-

compliance therewith, and the forfeiture clause of the Wickersham Act does not apply to a non-compliance with the Act, but to an actual violation of the Act; but even if the court should conclude that the defendant's title is defective, it cannot reverse the judgment of the trial court unless it finds that the plaintiff has a perfect title, and we submit that the plaintiff's title is fatally defective because the location notice does not comply with the territorial law. But if the court concludes that the case should be reversed, then we submit that the court should remand the case and order a new trial.

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